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No. 86-360

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FIRST TRUST & SAVINGS BANK OF KANKAKEE, an Illinois Banking Corporation, Administrator of the **ESTATES OF LONZO GLISPIE** and **J. T. ROBERSON, JESSIE GLISPIE**, and **LELA ROBERSON**,

Petitioners,

v.

COMMONWEALTH EDISON COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent opposes the Petition for Writ of Certiorari on the following grounds:

I. LACK OF JURISDICTION

The Petition for Certiorari should be denied because this court lacks jurisdiction to grant the writ of certiorari requested. The Court's Certiorari jurisdiction over state court decisions is limited by 28 U.S.C. Sec. 1257 to "Final judgments or decrees rendered by the highest Court of a state in which a decision could be had." Petitioners invoke said 28 U.S.C. Sec. 1257 to show jurisdiction.

The Petitioners seek certiorari with respect to the opinion of the *Appellate* Court of Illinois, Third Judicial District, affirming the dismissal of the Fourth Amended Complaint and dismissal of the case (Pet. pp. 6, 7 & 8).

The highest Court in Illinois in which a decision could be had is the Illinois Supreme Court. This court refused Petitioners' Petition for leave to appeal from the Appellate Court (Pet. App. B-1). In doing so, the Illinois Supreme Court refused to pass on the Appellate Court's opinion and therefore made no decision in the case.

The Petition itself seeks a writ of certiorari directed to the *Appellate* Court of Illinois, Third Judicial District, not to the Illinois Supreme Court, and therefore fails to meet the jurisdictional requirements of said section 1257.

Without waiving or abandoning said lack of jurisdiction, Defendant sets forth below several additional grounds for the denial of the Petition.

II. DIFFERENCES BETWEEN COURTS OF VARIOUS STATES

Petitioners (p. 8) contend a reason for granting the Petition is that the various state decisions are in conflict. However Section One of the Fourteenth Amendment provides that no state shall "Deny to *any person within its jurisdiction* the equal protection of the laws."

Petitioners rely on conflict of cases arising in various states which do not involve persons within Illinois and which are not covered by the equal protection amendment.

Such a conflict may be merely corollary to a *permissible* difference of opinion between state courts (32A Am. Jur. 2d Sec. 786, p. 234), and does not violate the equal protection clause of the amendment.

III. NO FEDERAL QUESTION INVOLVED

The dismissal of counts I and II of the Fourth Amended Complaint was affirmed by the Illinois Appellate Court based on Plaintiffs' failure to plead facts showing that the Defendant company knew of a *particular* dangerous condition so that it would be reasonably foreseeable that an injury would occur. And that therefore the Fourth Amended Complaint failed to allege a legal duty.

Plaintiffs attempted to supply this deficiency by contending that Defendant was charged with constructive notice of the alleged dangers from the *particular* tower by reason of many TV towers in the general area under the holding in the *Mississippi P & L Co. v. Shephard* case (Pet. p. 26).

The appellate court rejected the *Mississippi* case because it was contrary to the general rule in Illinois that one only has a duty to protect against occurrences which are reasonably foreseeable, which in turn must be based on knowledge of the particular dangerous condition.

The Court held that if Plaintiffs' theory of constructive notice were adopted it would entail the rejection of concepts developed over a series of similar Illinois cases and improperly cast the Defendant in the role of insurer. This holding did not involve a federal question but only the question of what facts need be alleged to charge Defendant with notice of a dangerous condition.

IV. DECISION NOT BASED ON FEDERAL QUESTION

In addition to Plaintiffs' reliance on constructive notice, Petitioners contend that the distinction between a power company's duties with respect to its lines over public property as opposed to private property denied Plaintiffs

equal protection of the laws under the Fourteenth Amendment.

But neither the Appellate Court (Pet. App. A-1) nor the two opinions of the trial judge (Rec. *C86*, and *C130*) are based upon any such distinction, nor even mentioned in either of said opinions.

Plaintiffs based their case on constructive notice of a dangerous condition and in so doing admitted that Respondent had no actual notice.

This position was rejected as contrary to settled Illinois law which requires knowledge of the *particular* dangerous condition so that it would be reasonably foreseeable that injury would occur.

> *Clinton v. Commonwealth Edison*, (1st Dist. 1976) 36 Ill. App. 3d 1064, 344 N.E. 2d 509
>
> *Stambaugh v. Central Illinois Light Company*, (3rd Dist. 1976) 42 Ill. App. 3d 582, 356 N.E. 2d 148
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> *Nelson v. Commonwealth Edison*, (2nd Dist. 1984) 465 N.E. 2d 513, 80 Ill. Dec. 401
>
> *Foote v. Scott-New Madrid-Mississippi Electric Co-operative*, (Mo. App. 1962) 359 S.W. 2d 40
>
> *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300 (1942)

The Court decided the case on the failure of Plaintiffs to allege facts showing knowledge of a particular dangerous condition.

The Court's decision was based solely on non-federal grounds. How one can make a federal question out of whether facts are alleged showing notice of a dangerous condition is very difficult to fathom.

V. FOURTEENTH AMENDMENT NEVER PLED—DECISION NOT BASED THEREON

Petitioners attempt to create a federal question out of the distinction the Illinois Courts make between the Defendant's duties with respect to its power lines installed over public properties, such as streets and other public places, on the one hand, and lines over private properties such as, in this case, the backyard of a residence. Such a distinction is part of the settled law in Illinois, is reasonable and sound and is based upon the marked differences in the use made of public streets, playgrounds and the like and the use normally made of residential backyards, such as gardens, lawns, etc.

In this connection it is pointed out that, as stated, neither the appellate Court nor the trial Court based its ruling on this distinction, but solely on Plaintiffs' failure to allege facts showing knowledge by Defendant of a particular dangerous condition.

None of the several complaints in this case pled any violation of the Fourteenth Amendment. After the Court dismissed the Fourth Amended complaint (Pet. App. D), Petitioners filed a Motion to Reconsider (Pet. App. E), in which they for the first time contended that the dismissal of the Fourth Amended Complaint denied them equal protection of the laws under the Fourteenth Amendment.

The Trial Court denied the Motion to Reconsider—and the Appellate Court affirmed the Trial Court without reference to the Fourteenth Amendment contention—but upon the sole, non-federal grounds that the Petitioners failed to allege facts showing that Defendant had knowledge of the alleged *particular* dangerous condition.

VI. NO SPECIAL AND IMPORTANT REASON AS REQUIRED BY SUPREME COURT RULE 17 IS SHOWN, NOR IS THE SUBSTANTIAL QUESTION REQUIREMENT MET.

In spite of the Illinois Supreme Court's denial of leave to appeal, Petitioners desperately seek to have their case reviewed by this Court and in so doing attempt to create a federal question where none exists.

Without any facts alleged in the complaint, or on any basis whatever, Petitioners contend that the outcome of the lawsuit would affect the lives and welfare of a substantial number of people (Pet. 22). The same may be said of any number of lawsuits such as the thousands of lawsuits involving automobile accidents, personal injuries generally and the like—but that does not make them proper subjects for certiorari or create a federal question, much less furnish a special and important reason or a substantial federal question for certiorari.

This case is just an ordinary, everyday, mine-run death case, in which the Fourth Amended Complaint failed to state facts showing a duty on the part of the Defendant. The Petitioners had four chances to allege facts showing that the Defendant had knowledge of a particular dangerous condition which, in turn, would make the injury reasonably foreseeable. This they did not do.

Although Defendant contends there is no substantial question whatever in this case, even if there might be, where the state court judgment rests on two grounds, one federal the other not, this court has denied certiorari. 32A Am. Jur. 2d Sec. 784, p. 233.

For the reasons that Petitioners in "II. conflicting opinions among the Courts (Pet. 24) admit that a federal question is not presented," Defendant will not comment on the same except to say that the Mississippi *Galloway* case quoted (Pet. p. 25) is clearly contrary to the settled law in Illinois.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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